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IN THE

Supreme Court of the United States

October Term, 1951

No. 599

LUDWIG H. SAUER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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DARK PAGE

SUBJECT INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	9

Appendix A. Tabular Digest of Cases.

BLEEDTHRU

TABLE OF AUTHORITIES CITED

Cases	Page
Brown v. Luster, 165 F. 2d 181	7
Dodds v. Williams, 163 F. 2d 724	7
Harrison v. Greyvan Lines, 331 U. S. 704	8
Heller v. Inter-Boro Sav. and Loan Assn., 166 F. 2d 83	7
Hudspeth v. Esso, 170 F. 2d 418	7
Karas v. Kleni, 70 Fed. Supp. 469	7
Kay v. General Cable, 144 F. 2d 653	7
King v. S. W. Greyhound Lines, 169 F. 2d 497; cert. den. 335 U. S. 891	7
Lee v. Remington Rand, 68 Fed. Supp. 837	7
Levine v. Berman, 161 F. 2d 386; cert. den., 332 U. S. 792	8
Loeb v. Kivo, 169 F. 2d 346; cert. den., 335 U. S. 891	7
MacMillan v. Montecito Country Club, 65 Fed. Supp. 240	7
Rosenbaum v. Ceco Products, 172 F. 2d 33; affg. 84 Fed. Supp. 954	7
Rutherford Food Corp. v. McComb, 331 U. S. 722	8
Travis v. Schwartz Manufacturing Company, 20 C. C. H. Labor Cases, par. 66,501	7
United States v. Silk, 331 U. S. 704	8

Statutes	
Labor-Management Relations Act (29 U. S. C., Sec. 152(3))	9
Selective Training and Service Act of 1940, Sec. 8 (54 Stats. 890)	2
Social Security Act (Gearhart Amendment, 62 Stats. 438, amending 26 U. S. C., Secs. 1426(d), 1607(i))	9
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 42, Sec. 1301(a)	9

DARK PAG

PAGE

United States Code, Title 50, App., Sec. 308 2

United States Code, Title 50, App., Sec. 459 3

Universal Military Training and Service Act of June 24, 1948 (amended June 19, 1951, 82d Cong., 1st Sess., Chap. 144, Pub. Law 51) 3

TEXTBOOKS

Aspley, Sales Manager's Handbook (6th Ed., Chicago), p. 395 8

3 Sixteenth Census of the United States (1940), Table 58, p. 76 8

BLEEDTHRU

IN THE

Supreme Court of the United States

October Term, 1951

No.....

LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 13, 1951.

Opinion Below.

The oral opinion of the District Court [R. 220] is unreported. The opinion of the Court of Appeals [R. 238] has not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 13, 1951 [R. 248], and a petition for a rehearing was denied on January 4, 1952 [R. 249]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether a traveling salesman paid by commissions is entitled, as an honorably discharged veteran, to re-employment.

Statute Involved.

Selective Training and Service Act of 1940, Section 8, 54 Stat. 890, as amended, 50 U. S. C. Appendix 308, the pertinent provisions of which follow:

> "(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, * * *
>
> "(b) In the case of any such person who, in order to perform such training and services, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service * * *
>
> "(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * * * * * *
>
> "(e) In case any private employer fails or refuses to comply with the provisions of subsection (b)

> * * * the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. * * *"

These provisions have been reenacted by Congress in the Universal Military Training and Service Act of June 24, 1948, as amended by Act of June 19, 1951, 82nd Congress, 1st Session, c. 144, Public Law 51, 50 U. S. C. Appendix 459.

Statement.

Petitioner sought a mandatory injunction compelling his reinstatement in the employ of the respondent and incidental damages sustained from loss of commissions due to respondent's denial of his application for reinstatement made within 90 days after he was relieved from service in the naval forces of the United States.

The District Court ordered respondent to reinstate petitioner as its sales manager in the Kansas City territory [R. 20] and found that he was entitled to damages [R. 18].

The Court of Appeals reversed this judgment upon the sole ground that the District Court erred in concluding that petitioner was not an independent contractor. The

Court of Appeals ruled that petitioner had no reemployment rights under the Selective Service Act [R. 243].

Petitioner joined respondent's sales force in 1932 [R. 29-31, 164], after respondent made arrangements to get him some other line to help carry him while he was opening up the midwest territory for respondent [R. 31]. From 1932 to November 1942, when he joined the Navy, petitioner sold respondent's merchandise in the midwest territory [R. 12]. He continued to carry the other lines but over half his commissions were derived from respondent's merchandise [R. 242].

Until 1938 petitioner did not have any written contract with the respondent corporation [R. 39]. In the 1938 contract he was denominated "salesman"; in 1939, "representative," and from 1941 on, "manufacturers representative" [R. 167]. This final contract was terminable upon 30 days' notice and contained a provision, absent in the previous contracts, that "no employer-employee relationship is established by this writing." However, respondent's president testified that the changes in nomenclature were "purely a device of words, and did not in any way alter the relationship" between the parties [R. 167] which had not, in fact, been changed from the time petitioner first came into the company [R. 166].

This same official informed the United States Government in 1942 that petitioner had been "district manager" of his company for many years [R. 181]. Respondent paid petitioner's expenses to attend a sales meeting [R. 44]; gave him an "employee's" service pin [R. 46, 184];

sought his picture in uniform to be printed in the company house organ [R. 55, 56]; and deducted money from his commissions to build an employee's club house [R. 49, 185].

The Court of Appeals gave weight to the fact that petitioner "solicited orders from whatever customers he selected and * * * determined his own working hours, sales routes, and itineraries, using whatever selling techniques he desired" [R. 242].

However, petitioner was requested by respondent corporation to make reports concerning his itineraries although he did not follow any regular reporting plan as requested [Ex. 50, 6(e); pre-trial stipulation].

Respondent corporation from time to time furnished petitioner names and customers in his territory and he reported to respondent regarding the same [*ibid.*, 6(e)].

From time to time respondent corporation requested petitioner to report to it upon his activities in collecting past-due accounts. The corporation had the final authority on extension of credit to customers [*ibid.*, 6(h)].

Petitioner made suggestions to appellant corporation to improve its sales [R. 84]. He assisted the designing of many special tools [R. 181].

His duties even included repair and maintenance work on the company's display boards [R. 102].

In order to do this work, petitioner was furnished a complete tool kit with varnish and paint and brackets by the corporation. He was given another kit to repair

work by er	Year veteran went on job	Social Sec. Tax Deducted	Assistants paid by veteran
	1942		
	1938		
	do		
ide"	1939		
	1931	Yes	
	1941		
	1941		
	1939		
	1939		
	1942		
	1941		
	1941	No	
	1941		
	1939		
	1933	No	Yes
	1936		
	1943		Yes
	1940	No	Yes
	1942		
	1941		
	1942		
	1942		
	1932	No	Yes
paid rent			Yes
	1936	No	

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 1

Questions presented 2

Statute involved 2

Statement of the case 2

Argument 9

The decision of the Court of Appeals turns on an analysis of particular facts and does not involve an important question of federal law 9

There is no conflict of decisions 11

The decision below is correct in holding that petitioner was an independent contractor and therefore not within the coverage of the act 16

Two alternative grounds support the Court of Appeals' decision 19

1. Respondent fully satisfied any obligation it may have had to petitioner by offering him "a position of like seniority, status and pay" 19

2. Petitioner's claims for reinstatement and damages are barred by the statute of limitations 21

Conclusion 22

Appendix A. Pre-trial stipulation ..... App. p. 1

DARK PAGE BLEEDTHRU

broken tools that the jobbers would give him on regular calls [R. 102]. Respondent corporation made its own display truck available to petitioner and paid him $200 in December, 1941, for repairs and tires for said truck [Ex. 50, 6(d); pre-trial stipulation].

Petitioner paid an assistant with his own money and the assistant acted pursuant to his instructions [R. 242].

Petitioner was not furnished an office by respondent [R. 242], and the evidence showed that petitioner always kept on the road; he never had a desk since 1932. He merely used a mail forwarding service from the warehouse where the company's stock was carried [R. 79]. Petitioner never paid for an office in his life. All he had was mail forwarding; he never had a chair, desk, or anything like an office [R. 82, 102].

No deductions were taken from his commissions on account of Social Security taxes, Old Age benefits, or Unemployment Insurance [R. 242].

Specification of Errors to Be Urged.

The Court of Appeals erred:

1. In holding that petitioner was an independent contractor.

2. In holding that petitioner, when he entered the Navy, did not leave "a position (other than a temporary position) in the employ of respondent."

3. In reversing the judgment of the District Court.

Reasons for Granting the Writ.

1. The decisions of the Ninth Circuit in the instant case and in *Brown v. Luster,* 165 F. 2d 181, are directly in conflict with the decisions of the Tenth Circuit in *King v. S. W. Greyhound Lines* (cert. den. 335 U. S. 891), 169 F. 2d 497; and the Third Circuit in *Kay v. General Cable,* 144 F. 2d 653, and *Heller v. Inter-Boro Sav. and Loan Assn.,* 166 F. 2d 83. On the other hand the decision below finds support in a decision by the Eighth Circuit in *Hudspeth v. Esso,* 170 F. 2d 418, and the District of Columbia in *Rosenbaum v. Ceco Products,* 172 F. 2d 33, affirming 84 Fed. Supp. 954.

2. The decision may also be in direct conflict with a decision of the Seventh Circuit when it decides on appeal the case of *Travis v. Schwartz Manufacturing Company* (decided by the District Court in the veteran's favor on August 10, 1951, reported at 20 C. C. H. Labor Cases, Par. 66,501).

3. The decision is in conflict with an earlier decision of the Ninth Circuit, *Dodds v. Williams,* 163 F. 2d 724, which had cited with approval three District Court decisions in direct conflict with this decision (*Karas v. Klein* (D. Minn.), 70 Fed. Supp. 469; *MacMillan v. Montecito Country Club* (D. S. Calif.), 65 Fed. Supp. 240; *Lee v. Remington Rand* (D. S. D. Calif.), 68 Fed. Supp. 837).

4. The question is now ripe for decision by this Court. Although this Court has denied certiorari in *King v. S. W. Greyhound Lines (supra),* in which the defense of independent contractor was urged and in two other salesman cases in which the defense of independent contractor was implicit but was not urged (*Loeb v. Kivo* (C. A. 2, 1948), 169 F. 2d 346, cert. den. 335 U. S. 891, and

Levine v. Berman (C. A. 7, 1947), 161 F. 2d 386, cert. den. 332 U. S. 792), it has never yet ruled upon a case where reemployment benefits were denied a veteran upon the ground of his being an independent contractor. In fact, this is the only veteran's reemployment case where the Court of Appeals has taken job rights away from a veteran by reversing a District Court which had found in his favor. (See tabular digest of cases—Appendix "A" this petition.) As a result a clear issue of law on this point is presented in this case.

5. The question here presented is of the utmost importance in the administration of the Universal Military Training and Service Act. The question has either arisen or been implicit in 26 lower court decisions and with contrariety in result. (See tabular digest of cases—Appendix "A" this petition.)

That the question must arise numberless times in controversies where recourse to the courts was not had is established by the fact that in 1940 there were 592,327 traveling salesmen and sales agents in the United States, 239,142 insurance agents and brokers, 90,094 canvassers and solicitors, and 54,370 newsboys (Sixteenth Census of the U. S.—1940, Vol. III, Table 58, p. 76, *Cf.* "Sales Manager's Handbook," Aspley (6th Ed., Chicago, 1950) p. 395).

6. The decision is in conflict with those decisions of this Court which have applied the "economic reality" test of employment rather than common law test (*Rutherford Food Corp. v. McComb* (194..), 331 U. S. 722; *United States v. Silk* (194..), 331 U. S. 704, and *Harrison v. Greyvan Lines* (194..), 331 U. S. 704).

Although the 80th Congress passed statutes to require the application of common law employer-employee control

doctrines under the Labor-Management Relations Act (29 U. S. C. 152(3)) and the Social Security Act (Gearhart Amendment, 62 Stat. 438, amending 26 U. S. C., Secs. 1426(d), 1607(i); 42 U. S. C., Sec. 1301(a)), the broad coverage of the Selective Service Act was left unchanged and has now been reenacted into the Universal Military Training and Service Act.

Men whose lives are governed by the Universal Military Training and Service Act are entitled to know now what future employment rights they will have when they come out of the service.

7. It is in the public interest that a clear declaration be made by this Court to the effect that all persons who held positions in civilian life comparable to that held by the petitioner in this case are entitled to be restored to that position upon honorable discharge from the service and that such right of restoration cannot be defeated by characterization of the veteran as an "independent contractor" in contradiction to the fundamental factors determining the true relationship.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. KENNY,
Counsel for Petitioner.

KENNY & MORRIS,
ARVEY, HODES & MANTYNBAND,
Of Counsel.

Circuit	Name of Case	Date	C. A. Citation	C. A. Action	D. C. Citation	Re-employment benefit to veteran	"Not a position in the employ of"
1	Salzman v. London Coat of Boston	1946	156 F.(2) 538	affirming	62 F.S. 371	denied	No
1	Trusteed Funds v. Dacey	1947	160 F.(2) 413	reversing	66 F.S. 321	granted	Yes
1	Same	1947	.....	.....	[2]72 F.S. 611	denied	No
2	Loeb v. Kivo (cert. den. 335 U. S. 891)	1948	169 F.(2) 346	affirming	77 F. S. 523	granted	No
3	Kay v. General Cable	1944	144 F.(2) 653	reversing	Unrep.	granted	Yes
3	Heller v. Inter-Boro Sav. & Loan Assn.	1948	166 F.(2) 83	affirming	12 C.C.H.[3] 63,744	granted	Yes
3	Allyn v. Abad	1948	167 F.(2) 901	reversing	Unrep.	granted	No
3	O'Connor v. Yardley	1948	171 F.(2) 40	affirming	16 C.C.H. 64,892	granted	Yes
4	Stanley v. Wimbish	1946	154 F.(2) 773	reversing	Unrep.	granted	Yes
4	Meyers v. Barenberg	1947	161 F.(2) 850	affirming	68 F.S. 697	denied	Yes[4]
4	Howie v. Lance	1949	172 F.(2) 107	affirming	Unrep.	denied	No
4	Bowen v. Home Beneficial Life	1949	183 F.(2) 376	affirming	18 C.C.H. 65,720	denied	No
7	Frank v. Tru-Vue	1946	(S. D. Ill.)	.....	65 F.S. 220	denied	Yes[5]
7	Levine v. Berman (cert. den. 332 U. S. 792)	1947	161 F.(2) 386	reversing	Unrep.	granted	No
7	Schwetzler v. Midwest	1949	174 F.(2) 612	affirming	Unrep.	denied	No
7	Travis v. Schwartz	August 10, 1951	(E. D. Wis.)	[6]	20 C.C.H. 66,501	granted	Yes
8	Whitver v. Aalfs-Baker	1946	(D. Minn.)	.....	67 F.S. 524	granted	No
8	Karas v. Klein	1947	(D. Minn.)	.....	70 F.S. 469	granted	Yes
8	Hudspeth v. Esso	1948	170 F.(2) 418	affirming	74 F.S. 123	denied	Yes
9	MacMillan v. Montecito Country Club	1946	(D. S. D. Calif.)	.....	65 F.S. 240	granted	Yes
9	Lee v. Remington-Rand	1946	(D. S. D. Calif.)	.....	68 F.S. 837	granted	Yes
9	Dodds v. Williams	1947	163 F.(2) 724	affirming	68 F.S. 995	granted	Yes
9	Brown v. Luster	1947	165 F.(2) 181	affirming	11 C.C.H. 63,482	denied	Yes
9	SANGER v. PLOMB TOOL	1951	Not yet reported	reversing	Unrep.	denied	Yes
10	King v. S. W. Greyhound Lines (cert. den. 335 U. S. 891)	1948	169 F.(2) 497	reversing	Unrep.	granted	Yes
D. C.	Rosenbaum v. Ceco Products	1948	172 F.(2) 33	affirming	84 F.S. 954	denied	Yes[5]

[1] = Decision placed solely upon this defense.
[2] = On retrial.
[3] = C.C.H. Labor Cases.
[4] = Defense urged in District Court only and there decided in Veteran's favor.
[5] = Decision NOT based solely on this defense.
[6] = Formal judgment not yet entered. Counsel state appeal will be taken to 7th Circuit.

Urged.

ion y rary	Employer's conditions changed	Veteran unfit for re-hiring	Job Description	Mode of Compensation	Form of Contract	Termination Provisions	Other lines or outside income	Equipment furnished by employer	Place of work supplied by employer
s[1]			Salesman		Written	At will		Yes	Yes
s	Yes		Salesman	Commissions	Written	Fixed term		Yes	Yes
		Yes[1]	do	do	do	do		do	do
	Yes		Salesman	Commissions				Yes	"90% outside"
	Yes		Physician	Salary	Oral	At will	Yes	Yes	Yes
s	Yes		Lawyer	Fees					
	Yes		Salesman	Salary	Written	1 year duration		Veteran paid $10 a week for "car expenses"	
			Golf pro						
s			Salesman	Salary and commissions	Oral	At will	Yes	No	Yes
	Yes		Lawyer	Salary and commissions					
s[1]			Salesman	Commissions				Veteran furnished own truck	
	Yes		Salesman	Commissions				No	No
	Yes	Yes	Salesman	Commissions	Written		Yes	No	No
	Yes		Salesman	Commissions					
			Salesman					Yes	No
			Salesman	Commissions	Written		Yes	No	No
			Salesman	Commissions				Travel expenses paid	No
	Yes		Rubbish hauler	Fixed fees and profits	Oral			No	No
			Plant lessor	Commissions	Written	30 days notice		Yes—but maintenance costs paid by veteran	
			Golf pro	Profits from sales of merchandise and services		At will			
			Salesman	Commissions	Written		Yes	No	No
			Taxi-fleet operator	Commissions	Oral	At will		Yes	Yes
			Salesman	Commissions	Oral	At will		No	No
	Yes		Salesman	Commissions	Oral to 1938—written since	At will to 1938 30 days to 1941 One year since	Yes	No—except display truck	No
			Station agent	Commissions	Written	10 day notice	Yes	No	No. Veteran paid rent
	Yes		Sales representative	Commissions	Written		Yes	No	No

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LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The oral opinion of the District Court [R. 220-224] is unreported. The opinion of the Court of Appeals for the Ninth Circuit [R. 238-247] is reported at 193 F. 2d 260.

Jurisdiction.

The jurisdictional requisities are adequately set forth in the petition.

DARK PAGE BLEEDTHRU

TABLE OF AUTHORITIES CITED

Cases	Page
Aeronautical District Lodge 727 v. Campbell, 337 U. S. 521	19
Brown v. Luster, 165 F. 2d 181	14, 18
Caldwell v. Harman, 12 C. C. H. Labor Cases, par. 63,671	22
Campbell v. City of Haverhill, 155 U. S. 610	21
Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390	21
Cummings v. Hubbell, 76 Fed. Supp. 453	22
Daniels v. Barfield, 77 Fed. Supp. 283	22
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275	19
Frank v. Tru-Vue, Inc., 65 Fed. Supp. 220	18
General Pictures Co. v. Electric Co., 304 U. S. 175	11
Harby v. Board of Education, 2 Cal. App. 418, 83 Pac. 1081	22
Harrison v. Greyvan Lines, 331 U. S. 704	14
Heller v. Inter-Boro Savings & Loan Assn., 166 F. 2d 83; affd., 12 C. C. H. Labor Cases, par. 63,744	12
Holmberg v. Armbrecht, 327 U. S. 392	21
Hudspeth v. Esso, 170 F. 2d 418	14, 18
Jones v. Board of Police Commissioners, 141 Cal. 96, 74 Pac. 696	22
Karas v. Klein, 70 Fed. Supp. 469	13
Kay v. General Cable Corporation, 144 F. 2d 652	12, 14, 16
King v. Southwestern Greyhound Lines, 169 F. 2d 497; cert. den., 335 U. S. 891	13, 14
Labor Board v. Hearst Publications, 322 U. S. 11	15
Labor Board v. Waterman S. S. Co., 309 U. S. 206	11
Lee v. Remington Rand, 68 Fed. Supp. 837	14
MacMillan v. Montecito Country Club, 65 Fed. Supp. 240	13
Meyers v. Barenberg, 68 Fed. Supp. 697; affd., 161 F. 2d 850	14

PAGE

Rosenbaum v. Ceco Steel Products Corporation, 172 F. 2d 33.... 18

Russell v. Todd, 209 U. S. 280..... 22

Rutherford Food Corp. v. McComb, 331 U. S. 722.....15, 17

Schreier v. M. H. Fishman Co., Inc., 176 F. 2d 722..... 19

Schwetzler v. Midwest Dairy Products Corporation, 174 F. 2d 612 19

Travis v. Schwartz Mfg. Co., 20 C. C. H. Labor Cases, par. 66,501 14

Williams v. Dodds, 163 F. 2d 724..... 13

Wisconsin Electric Co. v. Dumore Co., 282 U. S. 813..... 11

MISCELLANEOUS

St. Louis Daily Record, Sept. 8, 1949, p. 1, col. 7..... 11

STATUTES

California Code of Civil Procedure, Sec. 338, Subd. 1..... 21

Selective Service Act, Sec. 308(b), Subd. (B)..... 19

United States Code, Title 28, Sec. 1652.....21, 22

TEXTBOOKS

20 American Bar Association Journal (1934), p. 341..... 11

Questions Presented.

1. Whether the Court of Appeals was correct in holding that under the facts of this case petitioner was an independent contractor and had not left "a position . . . in the employ of any employer" within the meaning of the reinstatement provisions of the Selective Training and Service Act of 1940, as amended.

2. Whether the decision of the Court of Appeals is not also supported by the following additional grounds which were urged before that court but were not passed upon by it:

(a) That respondent fully satisfied any obligation it may have had to petitioner by offering him "a position of like seniority, status and pay," within the meaning of the Act.

(b) That petitioner's claims for reinstatement and damages were barred by the applicable statute of limitations and by laches and delay.

Statute Involved.

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set forth in the Petition at pages 2-3.

Statement of the Case.

Respondent, The Plomb Tool Company, is a California corporation engaged in the business of manufacturing and selling hand tools and related items. [Find. II, R. 12.]

In November, 1942 and for approximately nine years prior thereto petitioner was authorized to sell respondent's

merchandise on a commission basis as a manufacturer's representative in a specified territory referred to generally as the "Kansas City territory." [Find. III, R. 12.]

Immediately prior to petitioner's entry into the armed forces in November, 1942 he was operating under a written agreement with respondent, executed in January, 1941, as amended, which was terminable upon thirty days' written notice by either party and which provided that it should not be "construed to create any relationship of employer and employee." [Exs. 15, 16 and 19, R. 47, 48, 50.] Although as pointed out in the Petition (p. 4), a prior contract in 1938 designated petitioner as "salesman" [Ex. 7, R. 40], and a 1939 contract designated him as a "representative" to sell respondent's products "as an independent contractor" [Ex. 8, R. 41], the relationship was the same during the entire time petitioner was connected with the company [R. 166-167].

Petitioner represented six other manufacturers in addition to respondent, likewise selling their products as a manufacturer's representative on a commission basis. During 1941 and 1942, petitioner received 43% of his income ($20,244.49 out of a total of $46,316.65) from the six other manufacturers. [Pre-trial Stipulation, Ex. 50, par. 6(b) and 6(c), R. 17, which stipulation is printed as Appendix A to this brief for the convenience of the Court; Exs. J and K, R. 89-91; Ex. Q, R. 17, 100.]

Petitioner paid all his own expenses (averaging about $200 per week during 1941 and 1942) incurred in selling

respondent's products and those of the six other manufacturers, with the exception of $30 which respondent paid petitioner in partial reimbursement of his expenses in attending an automotive service industry convention, and $200 which respondent paid for the initial repairs and tires for a display truck which respondent made available to petitioner. [Pre-trial Stip., App. A, par. 6(d); Exs. J and K, R. 89-91.] Thereafter, petitioner paid all expenses of operating the display truck. [R. 77.]

Petitioner hired and paid with his own funds one assistant who was chosen by him and acted pursuant to his directions. [Pre-trial Stip., App. A., par. 6(d); R. 75.]

In the conduct of his business as a manufacturers' representative, petitioner chose his own customers and determined his own itineraries. He was requested by respondent to make reports concerning his itineraries and calls, but he did not follow any regular reporting plan as requested. Respondent from time to time furnished him with names of prospective customers in his territory from whom respondent received inquiries, and petitioner reported to respondent regarding the same. [Pre-trial Stip., App. A, par. 6(e).]

Respondent did not furnish petitioner with an office and did not pay or reimburse him for any office expense. [Pre-trial Stip., App. A, par. 6(a).] Petitioner furnished his own Cadillac automobile which he used in his business, taking depreciation on it in his personal income tax returns. [Exs. J and K, R. 89-91.]

No deductions from petitioner's commissions were made on account of social security taxes, old age benefits or unemployment insurance [R. 212-213; Pre-trial Stip., App. A, par. 6(f).] Respondent had the final authority on extension of credit to customers, and in specific instances from time to time respondent requested petitioner to report to it upon his activities in collecting past-due accounts. [Pre-trial Stip., App. A, par. 6(h).]

In a letter written by respondent's president at petitioner's request recommending petitioner for a commission in the Navy, petitioner was referred to as having been "district manager" for the company. [Ex. 22, R. 52-53, 181.] Respondent awarded petitioner service pins which were given to anyone, regardless of status, having more than two years of connection with the company, including directors of the corporation. [R. 46, 176-177.]

In his federal income tax returns, petitioner variously described the nature of his business as "manufacturers' agent" and as "manufacturers' representative," listing his income received from the several manufacturers represented by him and lumping together all his deductible business expenses. [Exs. J-O, R. 89-94.] His business stationery had printed at the top "Lionel H. Sanger," his Kansas City address and telephone, and at the bottom was the printed legend "Serving the Automotive and Industrial Jobber"; it bore no reference to respondent. [Ex. H, R. 83-84.]

In 1942 respondent declined petitioner's request that it seek draft deferment for him, stating that it could not do so because petitioner was an independent contractor. [Ex. 21, R. 52.] In November, 1942 petitioner entered the Navy.

He was honorably discharged in November, 1945. [Find. IV, R. 13.] In January, 1946, he applied to respondent for renewal of his pre-war status as a manufacturer's representative. [R. 122, 177.]

Prior to this application, respondent had determined that employment of full-time salesmen (as distinguished from manufacturers' representatives handling numerous lines) was necessary [R. 119, 120, 130]. This stemmed from customer resistance to such manufacturers' representatives and from the increase in the number of items manufactured by respondent, in the number of its customers and in the volume of its sales [R. 168-170]. Further, respondent had revised the geographic limits of its sales territories, reducing to some extent the area of petitioner's former "Kansas City territory." [R. 147, 152-153.] At that time the sales of respondent's products in the reduced Kansas City territory were being handled by three full-time salesmen employed by respondent. [R. 123, 124, 128, 157, 187.]

When petitioner applied for reinstatement in January, 1946, respondent advised him that in its view he had been an independent contractor and hence had no statutory right to reinstatement. [R. 142, 151-152, 217.]

Nevertheless, because it respected petitioner's ability as a salesman [R. 143, 152, 217], respondent offered him a position as a full-time employee in charge of his former "Kansas City territory" (as such territory had been revised to that date) selling exclusively the products of respondent and its subsidiary corporations, and replacing the man who had taken that position when petitioner entered the Navy, upon the identical terms then applicable to that man. [Pre-trial Stip., App. A, par. 10; R. 123-124, 129, 133, 148, 186-187, 211.] He was informed that it would be necessary for him to work for respondent exclusively and to cease to represent other manufacturers as he had done prior to the war. [Pre-trial Stip., App. A, par, 10; R. 122-124, 129, 133, 148, 186-187, 211.]

Although somewhat reduced in area, that territory then produced a far greater volume of business than it yielded in 1942 when petitioner left the company [R. 154, 158, 194-195, Ex. S]; and during 1946, the position so offered petitioner yielded earnings greatly in excess of petitioner's pre-war annual earnings from all sources. [Exs. 48-49, R. 111, 206-210; Ex. Q, R. 100.]

Petitioner refused to accept the offered position, stating that he was unwilling to give up his representation of other manufacturers. [R. 123, 131-132; Pre-trial Stip., App. A, par. 11.]

In March, 1946, petitioner consulted the Selective Service System regarding his claim for reinstatement. [Find. VII, R. 13.] The case was transferred from California

to the United States Attorney in Chicago (where petitioner resided), who did not file suit to enforce the claim and who turned the file over to petitioner in February, 1948. [Find. IX, R. 14.] Petitioner then employed private counsel, and after correspondence with respondent's attorneys, this action was filed on September 22, 1949, more than three years and seven months after respondent's initial refusal to reinstate petitioner in his pre-war status as a manufacturer's representative. [Find. X-XIII, R. 14-15.]

From January 1, 1946 to November 30, 1950, petitioner received over $116,000 from ten different firms for services rendered in the sale of their products. [Find. XVI, R. 17; Ex. Q, R. 100.]

The District Court ordered respondent to reinstate petitioner as a full-time employee in charge of the "Kansas City territory" for one year, and awarded him damages in the amount of $102,185.25.[1] [Judgment, R. 20-21.]

The Court of Appeals reversed this judgment on the ground that the findings of fact did not support the District Court's conclusion that petitioner held "a position . . . in the employ" of respondent and was not an independent contractor. [R. 245-247, 248.]

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[1]It is respondent's position, as argued in the Court of Appeals, that the relief awarded petitioner by the District Court was excessive as a matter of law. [See R. 229-230.]

ARGUMENT.

The Decision of the Court of Appeals Turns on an Analysis of Particular Facts and Does Not Involve an Important Question of Federal Law.

The Court of Appeals' opinion makes it clear that this case involves only the measuring of particular facts against the statute involved and settled principles of law. By guaranteeing reinstatement only to a veteran who has left "a position . . . in the employ of any employer," the Selective Service Act excludes from its coverage all independent contractors.[2] This statutory language thus required the Court of Appeals to determine whether petitioner was an independent contractor under the principles laid down by the Supreme Court and lower federal courts for determining the existence of such a status. Consequently, the Court of Appeals reviewed the facts in detail and concluded that they showed that petitioner was an independent contractor. [R. 245-246.]

The factual nature of the Court of Appeals' decision could hardly be more emphatically demonstrated than by the following statement from the opinion:

> "When the *facts of the instant case,* as stated in the District Court's Findings of Fact, and in the (adopted) stipulation of the parties *are set off against the criteria set forth hereinbefore,* and as suggested by a long line of cases, they call for the conclusion that appellee was not an employee of appellant, but rather an independent contractor. . . . . *The facts of this case* fail to reveal any

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[2]As we will show later, this is the unanimous view of all the courts which have considered this problem.

> of the supervision, control and direction that attaches to the employer-employee relationship." [R. 245; emphasis added.]

This quotation leaves no doubt but that the importance of the decision below is confined to the parties litigant and that it can affect others only in the rare instances where their particular contractual or factual relations happen to be similar. Moreover, it is also evident that this Court could review this decision only by going deep into the full record to determine whether the Court of Appeals properly applied settled principles to the unique facts of this one particular case.

Contrary to petitioner's claim (p. 2), it thus appears that the question presented in this case is far narrower and of much less general importance than whether any traveling salesman paid by commissions is entitled to reinstatement under the Selective Service Act. While it is true that petitioner was paid by commissions, it was also stipulated by the parties and found by the District Court that he was a manufacturers' representative who sold not only respondent's products but also those of six other manufacturers from whom he derived 43% of his income, that he paid his own expenses and the salary of an assistant whom he chose and directed, and that he chose his own customers and determined his own itineraries [Pre-trial Stip., App. A, par. 6; Find. XVII, R. 17]. Only after a careful analysis of these and the other facts of this particular record did the Court of Appeals hold that petitioner was an independent contractor and not an employee.

Properly viewed, the Petition for Certiorari in this case falls squarely within the principle that, "Granting of

the Writ [of certiorari] would not be warranted merely to review the evidence or the inferences drawn from it." *General Pictures Co. v. Electric Co.,* 304 U. S. 175, 178; see *Labor Board v. Waterman S. S. Co.,* 309 U. S. 206, 208. In line with this principle, Chief Justices Hughes[3] and Vinson[4] have emphasized that the Court does not review cases which relate solely to particular contracts or transactions or which turn upon the facts of the particular case. Applied here, this salutary principle would seem to require a refusal by this Court to accede to petitioner's request that it review the special and unique facts of this case.

There Is No Conflict of Decisions.

Careful examination of the cases cited by petitioner indicates that the asserted conflict of decisions does not exist. As in *Wisconsin Electric Co. v. Dumore Co.,* "the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law." 282 U. S. 813. The "contrariety in result" referred to by petitioner (p. 8) arises because the determination as to whether the plaintiff in each case was an independent contractor turns upon an analysis of

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[3]Chief Justice Hughes told the American Law Institute that, ". . . we find a very large proportion of the applications are without substantial grounds . . . for example, we have many applications where the questions raised are those relating to particular contracts or transactions and turn upon the facts of particular cases, and there is no controversy with respect to legal principles." 20 A. B. A. J. 341 (1934).

[4]Chief Justice Vinson told the American Bar Association that, "To remain effective the Court must continue to decide only those which present questions whose resolution will have particular importance beyond the particular facts and parties involved." St. Louis Daily Record, Sept. 8, 1949, P. 1, Col. 7.

the particular facts involved, and often upon a construction of particular contracts. In short, every case asserted by petitioner to create a conflict is distinguishable on the facts, as we shall presently show.

Kay v. General Cable Corporation (3 Cir. 1944), 144 F. 2d 652, which petitioner asserts is in conflict with the decision in this case, was the first Court of Appeals case to consider the question of reinstatement for independent contractors. Although it considered the phrase "a position . . . in the employ of any employer" to make the Act inapplicable to independent contractors (144 F. 2d at 654), the court went on to hold that the company doctor or "medical director" in that case was not an independent contractor and was entitled to reinstatement. It based that holding on the distinguishable facts that the doctor was paid a salary for specific hours of service each day in addition to being on call by the company at any time for injuries to employees (although he maintained some private practice in addition to his company duties), and that the company furnished all equipment and facilities, chose and paid his nurses and assistants, made deductions from his salary for social security and unemployment compensation, sought draft deferment for him as a regular employee, and had the right to discharge him at any time.

Likewise distinguishable on its facts is *Heller v. Inter-Boro Savings & Loan Assn.* (3 Cir. 1948), 166 F. 2d 83, in which the same Court of Appeals affirmed *per curiam* a district court decision (12 C. C. H. Labor Cases, par. 63,744). There the court granted reinstatement to an attorney engaged as solicitor for a loan company who was paid a specified flat fee for each mortgage loan handled by him in return for attending annual and

monthly meetings, for rendering general legal advice at all times upon request, and for drafting the necessary documents and handling all legal aspects of each loan made by the company.

The asserted conflict with *King v. Southwestern Greyhound Lines* (10 Cir. 1948), 169 F. 2d 497, cert. den. 335 U. S. 891, likewise disappears upon examination. After specifically recognizing that independent contractors are not covered by the Act, the court held that the contract gave defendants complete control over the details of plaintiff's operation of a bus depot and hence that plaintiff was an employee despite the provision of the contract that he was to be an independent contractor. Far from being inconsistent, the holding of the Court of Appeals for the Tenth Circuit that the effect of the contract was controlling over the nomenclature used therein is in accord with the Ninth Circuit's decision in this case. [R. 246.]

Nor is there conflict with the earlier Ninth Circuit decision in *Williams v. Dodds* (1947), 163 F. 2d 724. There the court tacitly recognized that independent contractors were not protected by the Act, but held that a manager of a taxicab business, who received fifty per cent of the gross profits as compensation and who was subject to discharge at will, was entitled to reinstatement. Each of the three district court decisions cited in that case recognized the inapplicability of the Act to independent contractors, but decided on the particular facts that the plaintiff involved did not fall in that category. *Karas v. Klein* (D. Minn. 1947), 70 Fed. Supp. 469, involving a rubbish hauler; *MacMillan v. Montecito Country Club* (S. D. Calif. 1946), 65 Fed. Supp. 240, involving a golf professional; *Lee v. Remington Rand*

(S. D. Calif. 1946), 68 Fed. Supp. 837, involving a typewriter salesman.[5]

It is noteworthy that the Courts of Appeal are completely unaware of any such conflict between their decisions as petitioner claims to find. Thus the Ninth Circuit in *Brown v. Luster* (1947), 165 F. 2d 181, which petitioner states is in accord with the decision below, cites with approval the Third Circuit decision in *Kay v. General Cable Corporation, supra,* which petitioner says is "directly in conflict." Conversely, the Tenth Circuit in *King v. Southwestern Greyhound Lines, supra,* cites and relies on *Brown v. Luster* for the proposition that independent contractors are outside the ambit of the Act. And in *Hudspeth v. Esso* (1948), 170 F. 2d 418, which petitioner refers to as supporting the decision below, the Eighth Circuit cites approvingly both *Kay v. General Cable Corporation* and *Brown v. Luster.*

Another group of cases which petitioner claims are in conflict with the decision below are the decisions of this Court applying the "economic reality" test in differentiating between employees and independent contractors under other social legislation (p. 8). As indicated below, these asserted conflicts are no more substantial than those discussed earlier.

In *United States v. Silk* (decided with *Harrison v. Greyvan Lines*), 331 U. S. 704, at 713, this Court called

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[5]The rule that independent contractors are not covered by the Act was recognized in the only two other decisions cited in petitioner's "tabular digest of cases" (Petition, App. A) where that issue was raised and decided in favor of the plaintiff. *Travis v. Schwartz Mfg. Co.* (E. D. Wisc. 1951), 20 C. C. H. Labor Cases par. 66, 501; *Meyers v. Barenberg* (D. Md. 1946), 68 Fed. Supp. 697, affirmed (4 Cir. 1947), 161 F. 2d 850 (without reference to independent contractor question).

attention to its rejection of the "power of control" test as the sole criterion for determining the coverage of the National Labor Relations Act (in *Labor Board v. Hearst Publications*, 322 U. S. 111) and to its conclusion that for such purposes " 'employees' included workers who were such as a matter of economic reality." In considering the coverage of the Social Security Act, this Court went on to say:

> ". . . degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete . . ." (331 U. S. at 716.)

Similar tests were applied by this Court in holding the meat-boners in *Rutherford Food Corp. v. McComb*, 331 U. S. 722, to be employees within the meaning of the Fair Labor Standards Act. The Court also noted that an "independent contractor" label in the contract is not controlling where the work done follows the usual path of an employee (331 U. S. at 729).

Far from being in conflict with the above cases, the decision below specifically applied the criteria therein set forth. The Court of Appeals quoted the tests outlined in the *Silk* case and measured the facts against them. [R. 244-245.] In full compliance with the *Rutherford Food Corp.* case, the Court of Appeals gave no undue emphasis to the independent contractor nomenclature used in the written contract between petitioner and respondent [Exs. 15, 16, R. 47, 48], for it pointed out that the *legal effect* of the relationship, as determined from the facts found by the District Court, accented the legal accuracy of the chosen phraseology [R. 246].

We do not understand petitioner to urge that independent contractors are within the purview of the Act or that there is a conflict of decisions in that regard. Out of an excess of caution, however, it is pointed out that every Court of Appeals and every District Court to which the question has been presented (and there have been many) have held that independent contractors are not covered by the Act. The sum of the matter is that the federal courts are in agreement on the principles of law to apply in this type of case and that the "contrariety of results" is produced solely by the application of these principles to particular and different facts.

The Decision Below is Correct in Holding That Petitioner Was an Independent Contractor and Therefore Not Within the Coverage of the Act.

As already pointed out, every court which has considered the question has decided that independent contractors are not within the coverage of the Selective Service Act.[6] This unanimity of decision, which dates back to the 1944 decision of the Third Circuit in *Kay v. General Cable Corporation*, 144 F. 2d 653, would appear to be compelled by the unequivocal language of the Act limiting its coverage to veterans who have left "a position . . . in the employ of any employer."

There is no merit in petitioner's strained attempt [pp. 8-9] to find some comforting negative implication in the recent amendments restricting the coverage of the Labor-Management Relations Act and the Social Security Act

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[6]None of the decisions cited in petitioners "tabular digest of cases" (Petition, App. A) casts the slightest doubt on this principle.

and in the lack of a comparable amendment to the Selective Service Act. On the contrary, the fact that Congress has not attempted either to broaden or to restrict the coverage of the Selective Service Act or to change its provisions upon its reenactment into the Universal Military Training and Service Act indicates a satisfaction with the course of judicial decision under the Act for the past eight years.

In determining whether petitioner was an independent contractor, the decision below correctly applied the criteria set forth in the *Silk* and *Rutherford Food Corp.* cases and in the veterans' reinstatement cases. Like the truckers in the *Silk* case, petitioner here conducted his own business "Serving the Automotive and Industrial Jobber" [see Ex. H, R. 83-84]; he paid his own expenses with minor exceptions [Pre-trial Stip., App. A, par. 6(d)]; he hired and paid his own assistant [R. 73-74]; he sold products not only for respondent, but also for six other manufacturers [Pre-trial Stip. App. A, par. 6(b)]; he owned his own automobile which he used in his traveling [Exs. J-O]; and he depended upon his own initiative, judgment and energy for a large part of his success.

As a matter of "economic reality," petitioner was not dependent upon respondent for his regular livelihood, for not only did he derive more than 43% of his pre-war income from other sources, but in 1946 and 1947 after he returned from service he earned substantially more from his other pre-war lines, excluding that of respondent, than he had earned from respondent plus the others in 1941 and 1942. [Find. XVI, R. 17, Ex. Q.] Viewing the total situation, the Court of Appeals correctly concluded that petitioner was an independent contractor and was therefore in no position to benefit by the Act.

The correctness of the decision below is further supported (as petitioner concedes, p. 7) by the following Court of Appeals cases:

In the Ninth Circuit case of *Brown v. Luster* (1947), 165 F. 2d 181, the facts were strikingly similar to those in the case at bar. There the plaintiff was a furniture salesman who operated in a specified territory under an oral agreement which was terminable at will by either party, who was paid by commissions, who was free to select his own customers and determine his own hours of work and itineraries, who paid all his own expenses and who was free to represent other manufacturers (although he had not done so for some time). The court denied reinstatement, holding that the plaintiff was an independent contractor.

In *Rosenbaum v. Ceco Steel Products Corporation*, 172 F. 2d 33, the Court of Appeals for the District of Columbia affirmed *per curiam* a district court decision (84 Fed. Supp. 954) reaching a similar result on similar facts. There the veteran, like petitioner here, was a sales representative authorized to operate in a specified territory and paid on commission basis. He paid his own expenses including the compensation of his assistants, handled the sale of other products in addition to those of the defendant and was free to determine his own hours of work and itineraries and to solicit orders in whatever manner and from whatever customers he chose. To the same effect is *Frank v. Tru-Vue, Inc.* (S. D. Ill. 1946), 65 Fed. Supp. 220.

In *Hudspeth v. Esso Standard Oil Co.* (8 Cir. 1948), 170 F. 2d 418, it was held that the operator of a bulk plant for the sale and distribution of petroleum products

under lease from defendant and pursuant to an agreement whereby he handled such products as consignee of defendant, hiring and paying his assistants and bearing all other expenses of the operation, was an independent contractor and hence not entitled to reinstatement.

Two Alternative Grounds Support the Court of Appeals' Decision

In view of its conclusion that petitioner was an independent contractor, the Court of Appeals did not consider other grounds for reversal which were urged by respondent in that court and any one of which is sufficient to support the decision. These additional grounds are as follows:

1. Respondent Fully Satisfied Any Obligation It May Have Had to Petitioner by Offering Him "a Position of Like Seniority, Status and Pay."

Section 308(b), subdivision (B) of the Selective Service Act gives the employer the alternative of restoring the veteran either to his pre-war position or to "a position of like seniority, status and pay." *Schwetzler v. Midwest Dairy Products Corporation* (7 Cir. 1949), 174 F. 2d 612. Thus the Act does not require the freezing of an employer's operations regardless of economic circumstances in order to preserve to the veteran his exact pre-war position. The veteran must take the position as he finds it upon his return from the service so long as he is treated equally with contemporary employees who did not join the armed services. He is not entitled to "super-seniority." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285-286; *Aeronautical District Lodge 727 v. Campbell*, 337 U. S. 521, 526; *Schreier v. M. H. Fishman Co., Inc.* (3 Cir. 1948), 176 F. 2d 722, 726.

Despite its belief that petitioner had no rights under the Act, respondent considered him to be a good salesman and offered him the current counterpart of his exact pre-war job. [R. 143, 152-217:] Had petitioner accepted that position, he would have replaced the man then in charge of the "Kansas City territory," as then constituted, who had succeeded to that position upon petitioner's entry into the Navy. His terms of employment as to commissions, territory and duties would have been identical to those applicable to the man he replaced. [Pre-Trial Stip., App. A, par. 10; R. 123-124, 129, 148, 186-187.] Although somewhat reduced in area, the territory offered to petitioner had produced in 1945 three times the dollar volume of business that it yielded in 1942 when petitioner left the company, and it accounted for a considerably greater percentage of respondent's total sales than it had in 1941 and 1942. [R. 154, 158, 194-195, Ex. S.] During 1946 the position so offered petitioner yielded earnings of approximately $39,500 [Exs. 48 and 49, R. 111, 206-210], as compared with petitioner's average annual earnings in 1941 and 1942 of approximately $12,500 from respondent and $22,200 from all sources [Ex. Q, R. 100].

It was a condition of the offer that petitioner would have to give up his other lines and give his full time to the company, as did the man currently in charge of the territory. The reason for this condition was that the substantial growth in the volume of respondent's sales and in the number of its customers, as well as adverse reaction of customers against manufacturers' representatives handling numerous lines, had combined to dictate the substitution of full-time salesmen for such representatives. [R. 119, 120, 130, 168-170.]

Petitioner refused to accept the offer and insisted upon continuing his representation of other manufacturers. [R. 122-124, 129, 133, 148, 186-187, 211.] In the circumstances, petitioner's insistence upon reinstatement in his *exact* pre-war position was unreasonable, for his freedom to represent others would necessarily disrupt respondent's selling methods and organization. Petitioner's rejection of this offer of the post-war counterpart of his former position—clearly "a position of like seniority, status and pay"—put an end to any obligation respondent may have had under the Act.

2. Petitioner's Claims for Reinstatement and Damages Are Barred by the Statute of Limitations.

The Selective Service Act prescribes no limitation period within which rights thereby conferred must be asserted. In these circumstances the appropriate statute of limitations of the state in which the action is brought is applicable under the Federal Rules of Decision Act. (*Campbell v. City of Haverhill,* 155 U. S. 610; *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U. S. 390.) As amended in 1948 [28 U. S. C. §1652], to apply "in civil actions" rather than only in actions "at common law," the Rules of Decision Act now compels the application of state limitations statutes in equitable actions for the enforcement of federal statutory right. *Cf. Holmberg v. Armbrecht,* 327 U. S. 392. The appropriate state statute of limitations is Section 338, subdivision 1, of the California Code of Civil Procedure, which provides a three-year limitation period for "an action upon a liability created by statute, other than a penalty or forfeiture." This statute has been specifically applied by the courts of California to claims for reinstatement based upon state statutes.

Jones v. Board of Police Commissioners, 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education,* 2 Cal. App. 418, 83 Pac. 1081. Since this action was commenced more than three years and seven months after the claim accrued by virtue of respondent's refusal to reinstate petitioner in January, 1946, the action is barred by the statute.[7]

Conclusion.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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O'MELVENY & MYERS
Of Counsel.

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[7]Even before the 1948 amendment of the Rules of Decision Act [28 U. S. C. §1652] when federal coutrs were not bound by state statutes of limitation in purely equitable actions to enforce federal rights, federal courts used the state limitation period (here three years) as a guide in applying the doctrine of laches. *Russell v. Todd,* 209 U. S. 280, 293. Hence, even if not barred by the statute of limitations, the action is barred by petitioner's laches and delay for more than three years and seven months before filing this action. See *Cummings v. Hubbell* (W. D. Pa. 1948), 76 Fed. Supp. 453; *Daniels v. Barfield* (E. D. Pa. 1948), 77 Fed. Supp. 283; *Caldwell v. Harman* (S. D. Calif. 1947), 12 C. C. H. Labor Cases, par. 63,671.

APPENDIX A.

[Title of District Court and Cause.]

Pre-Trial Stipulation.

(Plaintiff's Exhibit 50.)

STIPULATION OF FACTS.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel of record, that the following facts are true and may be taken by the Court as true for the purposes of this action, subject, however, to such objections, reservations or limitations as are hereinafter specified by the respective parties hereto in Section III of this Pre-Trial Stipulation, and subject further to the right of either party hereto to introduce at the trial of this action other evidence not inconsistent with the facts herein stipulated:

1. In this action plaintiff claims that defendant wrongfully failed to reemploy him after his discharge from the armed forces of the United States, in asserted violation of his rights under the Selective Service Act of 1940 (50 U. S. C. App. Sec. 308) and the Service Extension Act of 1941 (50 U. S. C. App. Sec 357). He seeks, (a) an order that he be reinstated in the employ of the defendant and, (b) a judgment for damages in the amount of $200,000.

2. Defendant is a corporation duly organized and existing under the laws of the State of California and defendant maintains a place of business at 2209 Santa Fe Avenue, City of Los Angeles, State of California. Defendant is engaged in the business of manufacturing and selling hand tools and related items.

3. In November 1942, and for approximately nine years prior thereto, plaintiff was authorized as a manufacturer's representative to sell merchandise of defendant on a commission basis in the following territory: the states of Kansas, Iowa, Minnesota and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the following counties in the State of South Dakota: Brown, Beadle, Sanborn and Bonhemme; and the City of Rock Island, Illinois.

4. In November 1942 plaintiff terminated his said relationship with defendant in order to perform military training and service in the armed forces of the United States, and plaintiff thereupon entered upon active naval service in the naval forces of the United States and served continuously thereafter in such naval service on active duty until November 15, 1945, at which time plaintiff was relieved from such training and service and was ordered released from active duty.

5. Immediately prior to plaintiff's entry upon active naval service as aforesaid, plaintiff was engaged in the sale of dependant's products on a commission basis as stated in paragraph 3 above under and pursuant to a certain agreement in writing between plaintiff and defendant executed by plaintiff on January 18, 1941, as amended by a supplemental territorial agreement dated February 1, 1941, and executed by plaintiff on March 19, 1941, by an extension agreement dated December 8, 1941, and executed by plaintiff on December 16, 1941, and by supplemental agreements dated respectively April 22, 1942, and September 23, 1942.

6. During the entire period from January 1, 1941, to November 1942 covered by the aforesaid written agreement, as amended and extended:

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(a) Defendant did not furnish plaintiff with an office and did not pay or reimburse plaintiff for any office expenses.

(b) Plaintiff as a manufacturer's representative represented other manufacturers in addition to defendant and was authorized to and did sell on a commission basis the products and merchandise of other manufacturers in addition to those of defendant. During the period from January 1, 1941, to November 1942, plaintiff so represented the following other manufacturers:

Wohlert Corporation, Lansing, Michigan;

Powell Muffler Company, Utica, New York;

Eis Automotive Corp., Middletown, Connecticut;

Pep Manufacturing Co., New York, New York;

National Motor Bearings, Oakland, California; and

Precision Parts Manufacturing Co., Chicago, Illinois.

(c) During said period from January 1, 1941, to November 1942, plaintiff received $26,072.16 from defendant as compensation for his sales of defendant's products, and during the same period plaintiff received from other manufacturers $20,244.49 as compensation for the sale of the products and merchandise of such other manufacturers.

(d) With the exceptions noted below, plaintiff paid his own expenses in connection with his activities as such manufacturer's representative in selling defendant's products and those of other manufacturers represented by him, and in connection therewith plaintiff hired and paid with his own funds one assistant who was chosen by plaintiff and who acted pursuant to plaintiff's directions. Defendant, in January 1941, paid plaintiff $30 in partial reimbursement of his expenses in attending an Automotive

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Service Industry Convention. Defendant made available to plaintiff a display truck owned by defendant, and in December 1941, defendant paid plaintiff $200 for repairs and tires for said truck.

(e) In the conduct of his business as such manufacturer's representative, plaintiff chose his own customers to whom he sold or attempted to sell products of defendant and determined his own itineraries in calling upon customers and prospective customers. Plaintiff was requested by defendant to make reports to defendant concerning such itineraries and calls, but plaintiff did not follow any regular reporting plan as requested. Defendant from time to time furnished to plaintiff names of prospective customers in plaintiff's territory from whom defendant received inquires, and plaintiff reported to defendant regarding the same.

(f) Defendant made no deductions from commissions paid or payable to plaintiff by it for or on account of Social Security taxes, old age benefits or unemployment insurance.

(g) Plaintiff made no investment in a stock of defendant's merchandise. In addition to its stock in Los Angeles, defendant maintained and paid the storage charges on a stock of merchandise in Kansas City from which customers in plaintiff's territory were supplied insofar as possible.

(h) Defendant had the final authority on extension of credit to customers, and in specific instances from time to time defendant requested plaintiff to report to it upon his activities in collecting past due accounts.

7. On November 15, 1945, plaintiff was placed on inactive duty by the United States Navy with a certificate of

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satisfactory service, and his terminal leave expired December 29, 1945.

8. During the month of January 1946 and within ninety days after plaintiff was released from training and service in the naval forces of the United States, plaintiff made application to defendant for renewal of his prewar status as a manufacturer's representative selling defendant's products as hereinabove described in Paragraphs 3 and 5 hereof, but upon such application defendant refused to renew plaintiff's said prewar status.

9. In January 1946 when plaintiff requested renewal of his prewar status with defendant, defendant had revised the geographical limits of its sales territories, and the State of Minnesota and all counties in the State of South Dakota had been eliminated from the territory in which plaintiff formerly had been authorized to sell defendant's products. At that time, the sales of defendant's products in such reduced territory were being handled by two full-time salesmen employed by defendant, which salesmen handled the sale of no products other than those of the defendant and its subsidiary corporations, P & C Hand Forged Tool Co. and Penens Corporation. Defendant had theretofore determined that the employment of full-time salesmen in said territory as aforesaid was necessary by reason of the increase in the volume of defendant's business and in the number of its customers.

10. In January 1946 when plaintiff applied for renewal of his prewar status, defendant offered plaintiff a position as an employee of defendant, selling exclusively the products of the defendant and its subsidiary corporations, P & C Hand Forged Tool Co. and Penens Corporation, either (a) in the territory in which plaintiff had been previously

LEEDTHRU

authorized to sell defendant's products on a commission basis, as such territory had been revised as aforesaid, or (b) in the "Chicago territory" which then consisted of the State of Illinois and portions of the States of Indiana, Michigan and Wisconsin. Plaintiff had, prior to his military service, handled and sold products of said subsidiary corporations only in cases where such subsidiaries had made tools for defendant on special orders, and only as a manufacturer's representative for defendant. Plaintiff was informed that if he accepted either of the foregoing proposals it would be necessary for plaintiff to work for defendant exclusively as set forth above and to cease to represent other manufacturers as he had done prior to the war.

11. During the month of January 1946, plaintiff advised defendant that he was unwilling to sever his connections with other manufacturers and was therefore unwilling to accept either of the positions offered him by defendant.

12. Thereafter and during the month of March 1946 plaintiff took up with the Selective Service System the matter of his claim for reinstatement with defendant.

13. Plaintiff was informed that the Office of the Director of Selective Service for the State of California had conferred and corresponded with defendant during or about the months of August, September and October 1946 regarding plaintiff's claim for reinstatement, and that the defendant refused to renew plaintiff's prewar status.

DARK PAGE

14. The United States Attorney in Chicago, Illinois did not file suit against defendant on behalf of plaintiff to enforce plaintiff's claim for reinstatement, and turned the file concerning such claim over to plaintiff in February 1948.

15. During or about February, 1948 plaintiff consulted the law firm of Arvey, Hodes and Mantyband of One La Salle Street, Chicago, Illinois, regarding the plaintiff's claim for reinstatement.

16. On or about November 4, 1948, the law firm of O'Melveny & Myers of 433 South Spring Street, Los Angeles, California, as attorneys for defendant, in a letter sent to said firm of Arvey, Hodes and Mantynband, rejected, on behalf of defendant, plaintiff's said claim for reinstatement, and the contents of such letter were made known to the plaintiff on or before December 1, 1948.

17. An action was filed by plaintiff against defendant in the United States District Court for the Northern District of Illinois on or about July 22, 1949, to enforce plaintiff's asserted right to reinstatement, which action was dismissed without prejudice on or about September 20, 1949, for want of jurisdiction over defendant in the Northern District of Illinois.

18. The geographical limits of the territory in which plaintiff formerly had been authorized to sell defendant's products have been further revised from time to time since January, 1946 and such territory now comprises the States of Kansas and Missouri, that portion of Nebraska east of the extension of the Colorado eastern border, cer-

EEDTHRU

tain counties in Illinois, and all of Iowa except certain counties therein. Each of the areas eliminated from time to time from said territory has been made a part of another of defendant's sales territories.

19. At the present time three salesmen employed by defendant are handling the sale of defendant's products in the territory referred to in the preceding paragraph. At all times since January, 1946 the sales of defendant's products in plaintiff's former territory have been handled by at least two salesmen employed by defendant, and during one period since that date four salesmen were employed by defendant to handle such sales in said territory; and at all such times such salesmen have handled the sale of no products other than those of defendant and its said subsidiary corporations.

20. During the period from January, 1946 to September 22, 1949, the date of the commencement of this action, defendant has paid large and substantial sums of money to salesmen employees as compensation for selling defendant's products in the territory in which plaintiff was formerly authorized to sell such products.

21. During the period from the date of plaintiff's release from the naval forces of the United States in December of 1945 to January 23, 1950, plaintiff rendered services to the following firms or corporations in the sale of their products, during the respective periods specified below and received from said respective firms or corporations as compensation for personal services the respective amounts set forth below:

Names and Addresses	Date of Employment	Gross Receipts
Wohlert Corporation Lansing, Michigan	Jan. 1, 1946, to date	$51,040.67
Eis Automotive Corp. Middletown, Conn.	Jan. 1, 1946, to date	20,606.55
Powell Muffler Company Utica, New York	Jan. 1, 1946, to date	5,090.29
Precision Universal Joint Co., Chicago, Illinois	Jan. 1, 1946, to Nov. 1947	1,334.00
Pep Manufacturing Co., New York, New York	Jan. 1, 1946, to Feb. 1949	1,836.71
Warehousing Service Co., Chicago, Illinois	Jan. 1, 1947, to March 1949	1,925.24
Hygrade Products Co., New York, New York	March 1947, to January 1948	1,054.36
U. S. Axle Company Pottstown, Pa.	Jan. 1946, to date	2,305.59
Buell Mfg. Company Chicago, Illinois	April 1948, to date	4,597.65
Bingham Herbrand Corp. Fremont, Ohio	March 1949, to date	1,757.99
TOTAL GROSS RECEIPTS		$91,549.05
Less Commissions to other salesmen		7,787.60
RECEIPTS		$83,761.45

The phrase "to date" in the foregoing tabulation refers to the date of January 23, 1950.

SUBJECT INDEX

PAGE

The decision of the Court of Appeals was purely one of law, not fact, and the law thereby established is important in the application of a federal statute to a large portion of the population 1

This court has never ruled on the applicability of the "economic reality" test to veterans' reemployment statutes..... 2

The alternate grounds of decision relied on by respondent were not decided by the Court of Appeals..... 3

DARK PAGE BLEEDTHRU

TABLE OF AUTHORITIES CITED

CASES PAGE

Wintuft Corp. v. Fuquea, 191 F. 2d 847 3

STATUTES

Universal Military Training and Service Act (Act of June 19, 1951, 82d Cong., 1st Sess., Chap. 144, Pub. Law 51, 50 U. S. C., App. 459) 2

DARK PAGE BLEEDTHR

IN THE

Supreme Court of the United States

October Term, 1951
No. 599.

LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

PETITIONER'S REPLY MEMORANDUM.

The Decision of the Court of Appeals Was Purely One of Law, Not Fact, and the Law Thereby Established Is Important in the Application of a Federal Statute to a Large Portion of the Population.

The decision of the Court of Appeals was not of a factual nature as contended by respondent (Resp. Br. p. 9) but was solely one of law. The District Court, after trial, found the facts in favor of the veteran. The Court of Appeals did not disagree with the trial court as to these facts but held that the veteran was not entitled to his judgment, purely as a matter of law.

Thus this Court, on certiorari, is not called upon to decide any disputed issue of fact.

There can be nothing unique or particular in this case about the relationship of the veteran (petitioner) and the principal source of his pre-war livelihood (respondent).

In 1940, there were 592,327 traveling salesmen and sales agents in the United States (See census statistics recited in Petition, p. 8).

Respondent has not disputed petitioner's position that the question here presented is of the utmost importance to the administration of the Universal Military Training and Service Act (Act of June 19, 1951, 82nd Congress, 1st Session, c. 144, Public Law 51, 50 U. S. C., Appendix 459).

This Court Has Never Ruled on the Applicability of the "Economic Reality" Test to Veterans' Re-employment Statutes.

Respondent correctly points out that the Courts of Appeal have unanimously ruled that an independent contractor has no veteran's re-employment rights. But that is not the problem here.

In the past, this Court has spelled out the differences between the term "independent contractor" and "employee," as used in the Social Security, Fair Labor Standards, and National Labor Relations Acts (Resp. Br. pp. 14-15).

However, the difference involved in the Selective Service and Universal Military Training and Service Acts lies between an "independent contractor" and "one who left a position in the employ of any employer."

The special perplexities presented by this latter term have never been passed on by this Court, despite the numerous occasions on which it has arisen in the administration of the Acts and in the Courts below.

Did Congress mean something different than "employee" when it used instead the term "one who left a position?" In this case the Court of Appeals vaguely

DARK PAGE BLEEDTHRU

adumbrated the problem but certainly did not answer it when it said [R. 246; 193 F. 2d 260, 264]:

> "We recognize that there are certain fringe relationships which do not fit into either the independent contractor category or that of a 'position in the employ of a private employer.' Were we here confronted with such a fringe situation, it might then be incumbent upon us to hold this veteran to be within the protective scope of the Act. Such is not the case here."

The Alternate Grounds of Decision Relied on by Respondent Were Not Decided by the Court of Appeals.

Although "respondent considered him to be a good salesman" (Resp. Br. p. 20), it urges this Court to deprive petitioner of his re-employment rights because:

1. He refused the particular post-war job offered by it (Resp. Br. pp. 19-20);[1]
2. He brought his action too late[2] (Resp. Br. pp. 21-22); and
3. The relief awarded him by the District Court was excessive (Resp. Br. p. 8, footnote 1).

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[1]The District Court chiefly based this part of its decision on the fact that the purported offer to petitioner was indefinite [R. 189-192] and not equal to the basis on which a stay-at-home salesman in the Pittsburgh area had been maintained by respondent after the war [R. 140].

[2]The problem of whether veterans' re-employment actions are to be governed by the conflicting limitation periods of the various states caused the Government to file an *amicus* brief on the petitioner's behalf when this case was before the Ninth Circuit. The question was also implicit in the recent case of *Wintuft Corp. v. Fuquea* (C. A. 5, 1951), 191 F. 2d 847, and there decided in the veteran's favor. This problem is one which the Court of Appeals should have the first opportunity to solve.

These issues were all decided in the petitioner's favor by the District Court and were left undisturbed by the Court of Appeals' decision [R. 243; 193 F. 2d 260, 263]. They are not ready for decision by this Court at least until decided by the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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DARK PAGE BLEEDTHRU

INDEX

	Page
Cases:	
Bartels v. *Birmingham*, 332 U.S. 126	4, 5
Fishgold v. *Sullivan Corp.*, 328 U.S. 275	4
National Labor Relations Board v. *Hearst Publications*, 322 U.S. 111	3, 5
Rutherford Food Corp. v. *McComb*, 331 U.S. 722	4
Trailmobile Co. v. *Whirls*, 331 U.S. 40	4
United States v. *Silk*, 331 U.S. 704	4
Statute:	
Selective Training and Service Act of 1940 (54 Stat. 890, as amended, 50 U.S.C. App. 308)	1

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 599

LIONEL H. SANGER, PETITIONER

v.

THE PLOMB TOOL COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Under the decision below, manufacturers' representatives and traveling salesmen working on a commission basis are denied the reemployment benefits granted by Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, as amended, 50 U.S.C. App. 308) to returning veterans who have left "a position, other than a temporary position, in the employ of any employer" to enter the armed forces of their country. They are denied these benefits not on the ground that the

declared policy and purposes of the Act will be effectuated by excluding this large group of veterans from the protection afforded by the Act but because of technical common-law distinctions between independent contractors and employees.

Although the court below purports to follow the principles established in recent decisions of this Court relating to employment relationships under remedial social legislation, it is apparent that it has misconceived the pronouncements of this Court. Thus, the court below states that "whether we are dealing with cases involving the responsibility of a person for the acts of those under his control or with remedial or regulatory statutes, the basic distinctions between an employee and an independent contractor are the same" (R. 244). And of these "basic distinctions," the court manifestly regarded the factor of degree of control as dispositive, declaring that "[respondent] looked to [petitioner] for a result, and in reaching it, [petitioner] was wholly free to exercise his own independent discretion. The facts of this case fail to reveal any of the supervision, control, and direction that attaches to the employer-employee relationship" (R. 245).

Under the opinion of the Court of Appeals, formulary, fine-spun distinctions, discountenanced by this Court, have been applied to withhold the rights guaranteed by the Selective Training and Service Act from a significant number of

veterans who, as a matter of economic reality, are entitled to protection. As the petition points out (Pet. p. 8), in 1940 there were 592,327 traveling salesmen and sales agents, 239,142 insurance agents and brokers, and 90,094 canvassers and solicitors in the United States. The jeopardy to which this large group is subjected by the rule announced in the opinion below warrants, we believe, further review by this Court.

Contrary to the approach taken below, this Court, in interpreting the term "employee" in analogous legislation, has rejected not only the reference of that question to local state law but also the application of "a sort of pervading general essence distilled from state law." *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 122. "It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. * * * Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law" (*Id.* at 125-126).

Further, this Court has pointed out that the determination of the relationship of employer-employee does not depend upon any single criteria such as the degree of control or on any "isolated factors but rather upon the circumstances of the

whole activity." *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 730. It is the "total situation" which is critical (*United States* v. *Silk,* 331 U.S. 704, 719); the test is one of "economic reality." *Bartels* v. *Birmingham,* 332 U.S. 126, 130.

Here, as in the legislation construed in those cases, the phrase "a position * * * in the employ of any employer" was not used by Congress as a word of art, "and its content in its context [is] a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.'" *United States* v. *Silk, supra,* at 713. The patent purpose of Section 8 of the Selective Training and Service Act was to protect veterans from being disadvantaged by their service to the Nation. *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 58. "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind." *Fishgold* v. *Sullivan Corp.,* 328 U.S. 275, 284. Accordingly, the Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.* at 285.

That purpose, we believe, is frustrated by the rule adopted below. Petitioner and others similarly situated cannot be characterized as distributors who undertake to market at their own risk the product of another. Whether they be termed man-

ufacturers' representatives, sales representatives, or traveling salesmen, they are, as a matter of economic reality, employees of, and dependent for their livelihood upon, those whose products they market. That their compensation is placed on a commission basis, rather than salary, does not alter the economic fact that the distribution function they perform is one in which the opportunity for profit or loss is primarily that of the employer. They play an integral role in the business of those whose products they sell and are no less deserving of the protection afforded by the Act than those who perform correlated functions in the process of distribution at the employer's place of business. "In the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels* v. *Birmingham, supra,* at 130. We submit, therefore, that "where all the conditions of the relation require protection, protection ought to be given" (*National Labor Relations Board* v. *Hearst Publications, supra,* at 129), and that persons like petitioner should be held to have a "position" "in the employ" of those for whom they worked, to which they are entitled to be restored.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 903844 910

SUBJECT INDEX

PAGE

The decision below is based upon the particular facts of this case 1

The Court of Appeals correctly applied the provisions of the Act in the light of principles of construction established by this court 4

DARK PAGE BLEEDTHRU

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Bartels v. Birmingham, 332 U. S. 126	4
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275	4
Lee v. Remington-Rand, 68 Fed. Supp. 837	2
Levine v. Berman, 167 F. 2d 386; cert. den., 332 U. S. 792	2
Loeb v. Kivo, 169 F. 2d 346; cert. den., 335 U. S. 891	2
National Labor Relations Board v. Hearst Publications, 322 U. S. 111	4
Rutherford Food Corp. v. McComb, 331 U. S. 722	4
United States v. Silk, 331 U. S. 704	4, 5
Williams v. Dodds, 163 F. 2d 724	2

STATUTES

Universal Military Training and Service Act of 1948, amended 1951 (50 U. S. C. A., App. Sec. 459)	4

IN THE

Supreme Court of the United States

October Term, 1951
No. 599.

LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

Respondent's Reply to Memorandum for the United States as Amicus Curiae.

The Decision Below Is Based Upon the Particular Facts of This Case.

There is no support whatever for *amicus curiae's* opening statement that "under the decision below, manufacturers' representatives and traveling salesmen working on a commission basis are denied . . . re-employment benefits" under the Selective Service Act. [A. C. Memo, p. 1.] Manifestly, the Court of Appeals' decision is limited to this particular manufacturers' representative paid by commissions where the other and controlling facts are as set out in Respondent's Brief in Opposition [pp. 2-8] and as summarized below.

DARK PAGE BLEEDTHRU

Likewise unwarranted is *amicus curiae's* conclusion that the decision would exclude from the protection of the Act the large numbers of persons shown by census figures to be engaged as "traveling salesmen and sales agents," "insurance agents and brokers," "canvassers and solicitors." [A. C. Memo, pp. 1, 2, 3; *cf.*, Petition, p. 9.] *Amicus curiae* jumps to that conclusion without any information concerning "the circumstances of the whole activity" surrounding any individual engaged in the listed occupations [which *amicus curiae* contends is critical; see A. C. Memo. pp. 3-4] and even without a showing that the supposedly affected individuals are paid by commissions [a point which *amicus curiae* seems to regard as governing the decision below].

Amicus curiae, like petitioner, seeks to over-generalize the question here presented and to exaggerate its purported importance by obscuring the plain fact that the commission basis of compensation was in no way determinative of the issue in the Court of Appeals* and that there are numerous salient facts which differentiate petitioner from the vast majority of commission salesmen.

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*The Court of Appeals for the Ninth Circuit has itself recognized that a commission salesman may, in an otherwise proper case, be entitled to reinstatement. See *Williams v. Dodds* (9 Cir., 1947), 163 F. 2d 724, citing with apparent approval *Lee v. Remington-Rand* (S. D. Calif., 1946), 68 Fed. Supp. 837. Similarly, commission salesmen were reinstated where the other facts showed that they were not independent contractors in *Loeb v. Kivo* (2 Cir., 1948), 169 F. 2d 346, cert. den. 335 U. S. 891; *Levine v. Berman* (7 Cir., 1947), 167 F. 2d 386, cert. den. 332 U. S. 792.

Petitioner was actually in business for himself. As a manufacturers' representative "Serving the Automotive and Industrial Jobber" [according to his own business stationery; see Ex. H, R. 88-84], he sold the products of seven different companies. [Pre-trial Stip., Ex. 50; App. A. to Resp. Br. par. 6(b).] While he did not market their products as a distributor who buys and resells [*cf.*, A. C. Memo. p. 4], petitioner did assume the risk of selling enough products to produce sufficient commissions to cover his expenses [averaging $200 weekly during 1941 and 1942 and including depreciation and upkeep on his automobile, salary of his assistant, meals and lodging on business trips, business entertainment and stationery and supplies; see Exs. J and K, R. 89-91], and yield him adequate compensation for his time and effort. His profit or loss was dependent upon his own initiative, judgment and energy, in determining the magnitude and scope of his operations, in choosing his customers, in planning his selling activities and in directing his efforts, matters which were left entirely to his own determination. [Pre-trial Stip., Ex. 50, App. A to Resp. Br., par. 6(c).]

It was on the basis of these and the other particular facts involved that the Court of Appeals held that petitioner had not left a "position . . . in the employ of any employer" within the meaning of the Selective Service Act.

The Court of Appeals Correctly Applied the Provisions of the Act in the Light of Principles of Construction Established by This Court.

The Court of Appeals did not ignore the rule of liberal construction of the Selective Service Act set forth in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, nor does the decision frustrate the policy of the Act. In conferring reemployment rights only upon those who left "a position . . . in the employ of any employer," Congress wisely recognized the impracticability of guaranteeing to every returning veteran the reestablishment of all his pre-war business relationships. As pointed out in Respondent's Brief in Opposition [p. 16], every court which has considered the question has interpreted the statutory language as excluding independent contractors from its coverage. And this course of judicial decision dating from 1944 has received Congressional approval through the reenactment of the reinstatement provisions without change in the Universal Military Training and Service Act of 1948 [as amended in 1951, 50 U. S. C. A., App. Sec. 459].

The Court of Appeals not only followed this established construction of the Act, but it also correctly applied the principles established by this Court for determining employment relationships under remedial social legislation in such cases as *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *United States v. Silk*, 331 U. S. 704; *Rutherford Food Corp. v. McComb*, 331 U. S. 722, and *Bartels v. Birmingham*, 332 U. S. 126.

The striking similarity between the facts of this case and the facts which led this Court in *United States v. Silk* to hold that the truck driver-owners there were independent contractors, demonstrates the fallacy in *amicus curiae's*

contention that the Court of Appeals has misconceived the pronouncements of this Court. [See A. C. Memo, p. 2.] In the *Silk* case the truck drivers owned their own trucks; petitioner owned his own Cadillac. The truck drivers hired their own helpers; so did petitioner. In one instance the truck drivers hauled coal for a single business and in the other for any customer, a distinction which this Court characterized as important though not controlling [331 U. S. at 719]; petitioner represented seven manufacturers and was free to represent anyone. In addition, this Court recognized in the *Silk* case that the degree of control exercised was a part of the total situation to be considered [331 U. S. at 719] just as did the Court of Appeals in its opinion below. [R. 245.] Like the truck driver-owners, petitioner was an independent business man, taking the risk of loss and enjoying the opportunity for profit from sound management.

The Court of Appeals not only "purported" to follow the principles established by this Court [*cf.*, A. C. Memo, p. 2], but actually measured the total factual situation in the instant case against the criteria laid down in the *Silk* case and reached, on similar facts, a conclusion entirely in accord with this Court's holding that the truck drivers there were independent contractors. Neither the opinion of the Court of Appeals nor its actual decision gives any indication of the application of what *amicus curiae* calls "formulary, fine-spun distinctions, discountenanced by this Court" [A. C. Memo, p. 2] nor of reliance upon local state law or anything other than Federal decisions. [*Cf.*, A. C. Memo, p. 3.]

An application of the "economic reality" test confirms the correctness of the conclusion reached by the Court of Appeals. As pointed out in Respondent's Brief in Op-

position [p. 17], petitioner was not dependent for his livelihood upon respondent, for not only did he derive more than 43% of his pre-war income from other sources, but after he returned from service, he earned substantially more in 1946 and 1947 from his other pre-war lines, excluding that of respondent, than he had earned from respondent plus the others in 1941 and 1942.

The most eloquent testimony showing petitioner's independent status and lack of dependence upon respondent for his livelihood as a matter of economic reality is found in the fact that upon his return from the service he refused respondent's offer of a position as a full-time employee which would have paid him approximately $39,500 during 1946. [Exs. 48, 49; R. 111, 206, 210.] Instead, he insisted upon continuing his own business of acting for numerous manufacturers. [R. 122-124, 129, 133, 148, 186-187, 211.] In short, he refused to become an employee and insisted upon renewal of his status as an independent contractor, a matter beyond the scope of the Selective Service Act.

Respectfully submitted,

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